STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA A. WISE,

Plaintiff-Appellant,

v

JILL SHINK, MICHAEL AMBROZIAK, FAMILY FOOT AND ANKLE CENTERS, PC, DR. TODD LAUGHNER, and DR. ANDREW COHEN,

Defendants-Appellees.

UNPUBLISHED
June 24, 2003

No. 235279
Saginaw Circuit Court
LC No. 00-031928-NH

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) and dismissing the case with prejudice. We affirm.

I. Facts and Proceedings

Podiatrists Dr. Jill Shink and Dr. Michael Ambroziak of the Family Foot and Ankle Centers, P.C., performed surgery on plaintiff's foot on January 28, 1998. Plaintiff alleged that the podiatrists committed medical malpractice for performing this procedure, causing perennial nerve damage and drop-foot and requiring a second surgery to be performed on October 16, 1998 by Dr. Todd Laughner and Dr. Andrew Cohen. Plaintiff alleged that Laughner and Cohen committed medical malpractice during the second surgery.

On July 20, 1999, plaintiff served Shink and Ambroziak with her notice of intent to sue, pursuant to MCL 600.2912b. On January 27, 2000, one day before the statute of limitations expired for her claims, plaintiff filed her complaint and an affidavit of merit by Dr. Edwin Season, an orthopedic surgeon.

Shink and Ambroziak moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) on the ground that the affidavit of merit was defective. They asserted that MCL 600.2169(1)(c) barred Dr. Season as an expert witness because he was an orthopedic specialist and not a general practitioner in the field of podiatry as were Shink and Ambroziak. They

asserted that, as a result of the defective affidavit of merit, the statute of limitations was not tolled by the filing of the complaint.

Plaintiff responded by asserting that the podiatrists exceeded the scope of the practice of podiatry and became orthopedic surgeons when they performed the surgery. Shink and Ambroziak responded by claiming that the case upon which plaintiff relied was issued before the Legislature enacted the 1986 tort reform act. They stated that the clear language of MCL 600.2169 barred plaintiff's attempt to offer Season as an expert witness in this medical malpractice claim. Plaintiff responded by filing a supplemental affidavit of merit by Dr. Jeffrey Kleis, who claimed to practice in the area of podiatry. Plaintiff argued that she was allowed to file the supplemental affidavit within ninety-one days of filing her complaint because Shink and Ambroziak failed to comply with her notice requirement, in violation of MCL 600.2912(d)(3).

Following oral arguments by the parties on summary disposition, the trial court took the matter under advisement. Plaintiff moved to amend her complaint to add Laughner and Cohen as defendants. The court then issued its opinion, granting summary disposition in favor of defendants Shink and Ambroziak pursuant to MCR 2.116(C)(10). The court ruled that the affidavit of merit by Season was defective on the grounds that Season was a specialist and not a general practitioner, as were Shink and Ambroziak. The court ruled that the affidavit of merit by Dr. Kleis was filed after the statute of limitations in the claims against the podiatrists had lapsed.

The trial court denied plaintiff's subsequent motion for reconsideration, and it issued an order granting summary disposition in favor of all defendants, including Laughner and Cohen, and dismissing the case with prejudice. This appeal followed.

II. Standard of Review

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). In opposition to the motion, the nonmoving party may not rest upon mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial. *Id.* In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties" in a light most favorable to the nonmoving party. *Id.* at 164. This Court may grant a motion for summary disposition "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Statutory interpretation is a question of law that this Court reviews de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 228; 532 NW2d 903 (1995).

III. Analysis

Plaintiff first asserts that she was allowed to file the affidavit of merit by Kleis within ninety-one days of filing her complaint on the ground that defendants Shink and Ambroziak failed to comply with her notice to access her medical records, in violation of MCL

600.2912d(3). In this case, the trial court ruled that plaintiff was not entitled to the ninety-one-day extension in which to file the affidavit because plaintiff had already filed an affidavit with her complaint, albeit a defective one. Without providing any analysis for her claim, plaintiff merely asserts on appeal that the court added an additional requirement to the language of the statute.

MCL 600.2912d(3) provides an automatic extension of time in which to file an affidavit of merit if the defendant fails to allow access to medical records. From our review of the record, we conclude that the trial court should have first determined whether defendants complied with the requirements of the statute. The record shows that plaintiff only cursorily claimed below that defendants failed to comply with her notice requirement. Plaintiff did not supplement her claim with anything whatsoever to survive summary disposition on this issue. Plaintiff's counsel did not dispute a cover letter that defense counsel offered the trial court at oral argument. The letter showed that defendants had promptly complied with the requirements of MCL 600.2912d(3). Because there is nothing in this record to show that defendants violated that statute, plaintiff was not entitled to the ninety-one-day extension to submit an affidavit of merit. Therefore, her claim on appeal fails.

Second, plaintiff argues that the trial court should have imposed a lesser sanction than the dismissal of her complaint against Shink and Ambroziak with prejudice. It is unclear from plaintiff's brief what exactly she argues. Nonetheless, we conclude that plaintiff's reliance on this Court's decisions in *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998); and *Christy v Detroit Osteopathic Corp*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 1999 (Docket No. 205827), is misplaced. The facts in those cases did not involve statute of limitations issues, as in the instant case. Further, it appears that plaintiff grounds her claim on the same argument to the effect that she was entitled to file the supplemental affidavit of merit pursuant to MCL 600.2912d(3). As previously discussed, this argument is without merit.

Third, plaintiff argues that the trial court improperly ruled that Season was not qualified as an expert witness. Plaintiff argues that Shink and Ambroziak were to be held to the standard of practice as an orthopedic surgeon rather than as podiatrists because they exceeded the scope of their medical licensure. In support of this argument, plaintiff relies on the decision in *DeHart v State Bd of Registration in Podiatry*, 97 Mich App 307; 293 NW2d 806 (1980) that provided that "[t]he standard of care, whether the action is against an impostor or a true member of the profession, is the same; both are required to conform to the standard of care of a member of the profession." *Id*. at 315, citing *Simpson v Hubert*, 35 Mich App 523, 528; 193 NW2d 68 (1971). We disagree. As Shink and Ambroziak point out on appeal, *DeHart* was decided before the 1986 tort reform legislation was enacted.

"Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and the statute must be applied as written." *Dance Corp v City of Madison Heights*, 466 Mich 175, 182; 644 NW2d 721 (2002). Judicial construction under such circumstances is not permitted. *Id*. Here, the plain and unambiguous language of MCL 600.2169(1)(c) requires a general practitioner to testify as an expert witness against a defendant who is a general practitioner. There is nothing in the language of the statute that would make the exception that plaintiff offers. Thus, plaintiff's argument fails.

Finally, plaintiff argues that the trial court erred when it sua sponte dismissed her claims against Laughner and Cohen. Specifically, plaintiff claims that she was not afforded the opportunity to properly file a response to Cohen's motion for summary disposition or present the issue in oral argument. We disagree. The lower court record indicates that the hearing on Cohen's and Laughner's motion for summary disposition was rescheduled to a date three weeks after the initial hearing date and then adjourned for another week upon plaintiff's request. Contrary to her assertion on appeal, plaintiff had filed her response to the motion. Further, MCR 2.119(E)(3) specifically authorizes the trial court, in its discretion, to dispense with or limit oral arguments with regard to motions. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000). We review such a decision for an abuse of discretion. *Id*. In this case, the trial court dismissed the claims against Laughner and Cohen when it determined that the claims were barred by the statute of limitations. On appeal, plaintiff does not dispute the statute of limitations determination. Accordingly, the trial court properly dismissed the claims.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell